IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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DANIELLE B.,

Plaintiff,

v.

Civil Action No.
1:22-CV-0471 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LAW OFFICES OF
KENNETH HILLER, PLLC
6000 North Bailey Avenue, Suite 1A
Amherst, NY 14226

JUSTIN M. GOLDSTEIN, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
OFFICE OF GENERAL COUNSEL
6401 Security Boulevard
Baltimore, MD 21235

FERGUS J. KAISER, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security ("Commissioner"), pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.[1] Oral argument was heard in connection with those motions on August 2, 2023, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

[1] This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order, once issue has been joined, an action such as this is considered procedurally as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

David E. Peebles
U.S. Magistrate Judge

Dated: August 4, 2023
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
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DANIELLE B.,

Plaintiff,

vs. 1:22-CV-471

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
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Transcript of a **Decision** held during a Telephone Conference on August 2, 2023, the HONORABLE DAVID E. PEEBLES, United States Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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(The Court and all counsel present by telephone.)

THE COURT: Let me begin by thanking counsel for excellent and very spirited presentations. I've enjoyed working with you on this matter.

The plaintiff has commenced this proceeding pursuant to 42 United States Code Sections 405(g) and 1383(c)(3) to challenge an adverse determination by the Acting Commissioner of Social Security, finding that she was not disabled at the relevant times and therefore ineligible for the benefits for which she applied.

The background is as follows: Plaintiff was born in September of 1985. She is currently 37 years old. She was 33 years of age at the alleged onset of her disability on October 1, 2018. The record is somewhat equivocal as to whether she is currently married. The record is also somewhat equivocal concerning her living arrangements. She has lived in a motel and a homeless shelter in Rensselaer. She has a disabled son who was 16 years of age at one point, there's reference to a 15-year-old daughter but it's unclear the relationship that she has with the daughter. Plaintiff stands 5 feet in height and weighs 180 pounds. She has an 11th grade education and while in school attended regular classes. Plaintiff does not drive but does take public transportation. She did have a felony driving while

intoxicated conviction in or about 2010 which may explain why she does not drive.

Plaintiff suffers physically from idiopathic angioedema which I understand is a reaction to a trigger that causes swelling in the tissue below the inner layer of the skin called the dermis or the layer below a mucous membrane. There are different types of angioedema. She suffers from idiopathic angioedema which is angioedema that has no known cause and can result in swelling to the face, hands, trunk, arms, and legs. She also suffers from allergies, asthma, obesity, back pain, and headaches.

Mentally, plaintiff has had various diagnoses, including depression, anxiety, panic attacks, an affective disorder, and post-traumatic stress disorder/trauma/stress.

Plaintiff stopped working on August 1, 2019, although there is indication of potentially subsequent work and clear efforts by the plaintiff to obtain medical clearance to return to work. While employed, plaintiff worked as a baby-sitter, cashier, personal care assistant, waitress, and housekeeper.

Plaintiff receives treatment from Whitney Young Health Services where she began treating in July of 2019 primarily with Dr. Robert Weissberg and Family Nurse Practitioner Jennifer McBain. She also has visited the Samaritan Hospital of Troy and the Albany Medical Center and

some other specialists. She undergoes telephone consultants -- consultations monthly.

In terms of activities of daily living, again, the record is a little ambiguous or unclear. She can dress, bathe, groom, at some point she states she can cook and at other points in the record she denies cooking. She can clean, do laundry, she does not shop, she has no hobbies, does not watch television or listen to the radio, and she says that she does not socialize with friends.

Procedurally, plaintiff applied for Title II and Title XVI benefits on April 24, 2015. That prior application was denied on November 1, 2017 in an administrative law judge decision. Most recently, she applied again on June 10, 2019 for Title II and Title XVI benefits, alleging an onset date of October 1, 2018 and claiming disability as result of idiopathic angioedema, anxiety, and asthma. A hearing was conducted to address those applications on November 23, 2020, by Administrative Law Judge, or ALJ, Arthur Patane. On December 4, 2020, at the ALJ's request, a vocational expert submitted written interrogatory responses to questions posed. A subsequent hearing was conducted on March 13, 2021, and the result was an adverse determination issued on April 2, 2021 by Administrative Law Judge Patane. That became a final determination of the agency on March 8, 2022 when the Social Security Administration Appeals Council denied plaintiff's

application for review of that determination. This action was commenced on May 6, 2022, and is timely.

In his decision, ALJ Patane applied the familiar five-step sequential test for determining disability.

At step one, while noting that there might be activity and unreported income since October 1, 2018, he nonetheless gave the plaintiff the benefit of the doubt and found that she had not engaged in substantial gainful activity since the alleged onset date.

At step two, ALJ Patane concluded that plaintiff does suffer from severe impairments that impose more than minimal limitations on her ability to perform basic work functions, including idiopathic angioedema, asthma, obesity, affective disorder, anxiety disorder, trauma, and stress-related disorder.

At step three, he concluded that plaintiff's conditions do not meet or medically equal any of the listed presumptively disabling conditions, specifically focusing on 3.03 dealing with asthma, Social Security Ruling 19-2p addressing obesity, 14.00 generally addressing angioedema, as well as 12.04, 12.06, and 12.15 related to plaintiff's mental impairments.

ALJ Patane next concluded based on the record that plaintiff is capable of performing light work notwithstanding her impairments as defined in the regulations except she must

avoid concentrated levels of respiratory irritants, she can interact frequently with others and is limited to unskilled simple work tasks and will be off task 5 percent of a workday.

Applying that residual functional capacity at step four, Administrative Law Judge Patane concluded that plaintiff is not capable of performing her past relevant work, listing the various positions that she held.

Proceeding to step five with the benefit of the testimony of a vocational expert and a hypothetical posed to that expert that tracked or mirrored the residual functional capacity finding, ALJ Patane concluded that plaintiff is capable of performing available work in the national economy, citing as representative positions those of silverware wrapper, marking clerk, and survey worker, and thus concluded that plaintiff was not disabled at the relevant times.

The plaintiff in this case is obviously a sympathetic character and I empathize with her homelessness and her situation and her physical and mental conditions. Nonetheless, my task is extremely limited and the standard I apply is highly deferential. I must determine whether substantial evidence supports the resulting determination, that being defined as such relevant evidence as a reasonable person would find sufficient to support a conclusion, and I must also ensure that proper legal principles have been

applied. The standard that I apply is stringent, as the Second Circuit noted in *Brault v. Social Security Administration Commissioner*, 683 F.3d 443, from June of 2012, and reiterated many times since, including most recently in *Schillo v. Kijakazi*, 31 F.4th 64 from April 6, 2022.

The plaintiff's contentions in this case are basically four. She focuses on the RFC finding and specifically the time that she would be off task and the number of days she would be absent, as well as the frequent interaction with others limitation in the RFC, alleging that they are not supported by substantial evidence and that there should have been a recognition of absenteeism and a greater recognition of off-task time.

Second, and these are intertwined, she challenges the administrative law judge's evaluation of medical opinions, including especially from Dr. Robert Weissberg and Nurse Practitioner Jennifer McBain, that's primarily 17F exhibit.

Third, she challenges the administrative law judge's determination regarding her subjective symptomology complaints.

And fourth, she argues that there is no support for a light work finding because the state agency consultants opined that she is capable of performing medium work.

Turning first to the RFC finding, of course pivotal

to any disability determination is the RFC finding which represents a range of tasks a plaintiff is capable of performing notwithstanding her impairments. And that means a claimant's maximum ability to perform sustained work activities in an ordinary setting on a regular and continuing basis, meaning eight hours a day for five days a week or an equivalent schedule. A determination concerning RFC must be informed and supported by consideration of all relevant medical and other evidence.

The focus, at least primarily, is upon the administrative law judge's weighing of the various medical opinions. The plaintiff argues that all of them were rejected -- I'm not sure that that's the case. I read it instead that certainly portions of all or most of the medical opinions in the record were discounted, but many portions were cited as supportive of the RFC finding. Evaluation of medical opinions is subject to new regulations under which an ALJ no longer defers or gives any specific evidentiary weight, including controlling weight, to any medical opinion or prior administrative medical findings, including those from a claimant's treating sources. 20 C.F.R. Sections 404.1520c(a) and 416.920c(a). In evaluating medical opinions, an ALJ must now apply relevant factors, including particularly considering the questions of supportability and consistency of those medical opinions, and must articulate

how persuasive he or she found each opinion and must explain how he or she considered the supportability and consistency of those medical opinions. There are other factors which an ALJ should consider but need not specifically address in his or her decision. And of course, the weight to give conflicting medical opinions is a matter entrusted to the administrative law judge in the first instance and should not be overridden by the court necessarily, unless it lacks rational basis and substantial evidence. *Veino v. Barnhart*, 312 F.3d 578 from 2002.

In terms of attendance and off task, the plaintiff's position appears to be primarily that flare-ups of her angioedema would cause her to be off task and absent. And I certainly agree that this is a relevant consideration if there is, if there is support for a finding that the flare-ups would interfere with the ability to perform work functions on a regular basis. *Perez v. Astrue*, 2009 WL 2496585 from the Eastern District of New York, August 14, 2019. The plaintiff testified to experiencing swelling 27 days per month, but careful review of the medical treatment records does not bear out that claim. And one prime example is a treatment note from Nurse Practitioner McBain from September 8, 2020 that appears at 591 to 594, it's one that has been heavily relied on by the plaintiff because it does reference missing work. However, it also notes the

following: She, meaning plaintiff, reports she is feeling okay, asthma and allergies are under control, reports last episode was two, three months ago when she was first in a homeless shelter and she was at medical -- Albany Med for observation overnight and prior to that it had been almost a year since an episode.

Later on, it also notes plaintiff is okay to work as symptoms are well controlled, plaintiff is aware to avoid triggers and keeps Albuterol inhaler and Epipen on her at all times. Patient knows she can work but may need to take a sick day periodically. The -- those quotes indicate -- oh, and by the way, parenthetically there is a provision concerning irritants in the RFC finding. The taking a sick day periodically is not quantified in that particular treatment note. Plaintiff argues that Nurse Practitioner McBain should have been recontacted to inquire as to the quantification of that, but a duty to recontact is only required if the record contains insufficient evidence to determine disability, 20 C.F.R. Section 416.920b(b). And I also note that I agree with the Commissioner that this probably does not technically qualify as a medical opinion under the new regulations.

There is reference to missing documents. Plaintiff argues that the social services records, food stamps and welfare from state agencies should have been obtained and are

missing. It's unclear specifically what those documents are and how they would be potentially relevant to plaintiff's ability to perform basic work functions. The Social Security applications are in the record, and in any event, it's plaintiff's burden to come forward with evidence to prove disability. There's no indication during the hearing that plaintiff's representative argued that these should be obtained and are relevant or that the record was incomplete.

The plaintiff quarrels with the administrative law judge's observation that plaintiff may have worked and certainly sought work clearances during the relevant period. That is clearly borne out, July -- let's see, October 25, 2018, 654 of the record; April 30, 2019, 699 of the record; June 21, 2019, 718 of the record; July 30, 2019, 721 in the record; September 8, 2020, 591 of the record. In any event, any error in finding that plaintiff was capable of and trying to work and may have worked is harmless because, at step two, the Commissioner, the ALJ that is, gave plaintiff the benefit of the doubt and found that she had not engaged in substantial gainful activity.

Plaintiff argues that these may have been failed work attempts which further her claim that she cannot work. There's no evidence that she has presented as to what those positions were, why she couldn't work in those positions, and why that would translate to a total inability to perform work

in any position.

One of the focuses of plaintiff's argument is on the medical opinion that appears at 728 through 730 of the record. It bears the signature of Nurse -- I'm sorry, of, yes, Nurse Practitioner McBain although it contains the -- also the information of Dr. Weissberg, it was attributed by the -- it is dated February 2, 2021, was attributed by the administrative law judge to Dr. Weissberg. The opinion states that plaintiff is seriously limited but not precluded in the ability to complete a normal workday and workweek without interruptions from psychologically-based symptoms, and in being aware of normal hazards and taking appropriate precautions and is unable to meet competitive standards in dealing with normal work stress. It also opines that plaintiff would be absent about four days per month.

The administrative law judge addressed it in the decision on page 23 and found it to be partially persuasive. The reasoning given: One, the author appears to have relied substantially on uncorroborated subjective reports when opining she would be absent four days per month, would need unscheduled indeterminate breaks, could walk about two blocks and could stand at only 45-minute intervals. As Commissioner noted, I agree that subjective reports are important, particularly in mental health cases, but the word uncorroborated qualifies that sentence, and secondly, it's

only one of four reasons given.

Second is plaintiff's longitudinal primary care and immunology clinical findings have been within normal limits; three, the claimant endorsed control of her condition in appointments in the months leading up to the assessment; and four, the only visit in the month prior related to another condition, TMJ, without active angioedema or asthma complaints, while medications had established good control of her disorders, and she repeatedly affirmed her belief that she could work in seeking medical clearances.

I also note that the -- I understand that the fact that an opinion is given on a check-box form in and of itself and standing alone is insufficient to reject or discount it; nonetheless, this opinion, other than listing diagnoses, does not explain the reasoning why plaintiff, for example, would be absent four days per month, and that is a factor that is proper, in my view, to take into consideration the lack of an explanation by the treating source or the author of the document.

As the administrative law judge points out, the Whitney Young treatment notes don't bear out what these opinions show. Longitudinal findings have been mostly normal. There were sporadic ER visits by the plaintiff. I quantify it at, one time in 2017, five times in 2018, nine times in 2019, and one time in 2020. In most of those

instances she was treated and discharged. I note that at least three of them appear to have been for the purpose of obtaining a return-to-work note, that is July 30, 2019, October 25, 2018, that was a physical exam for a new job with no other complaints, and April 30, 2019, return-to-work clearance with no complaints. And others of those were for non-angioedema reasons. Headaches, February 7, 2020; chest pain, February 26, 2019; chest pains, March 17, 2018. The medical records, as the ALJ found, just do not substantiate plaintiff's claims.

It is true that the administrative law judge did not incant those important words, supportability and consistency; however, I am able to glean the administrative law judge's reasoning on those issues from the record and the mere fact that they are not referenced alone does not provide a basis to find legal error. *Maria S. v. Kijakazi*, 2022 WL 4619861 from the Northern District of New York, September 30, 2022.

The plaintiff has cited some notes that reflect greater symptomology but it's not a sufficient basis to override the administrative law judge's decision. My role is to determine whether substantial evidence supports the resulting determination. It is up to the administrative law judge to weigh the conflicting arguments and I'm being asked only to reweigh the arguments, even if I were to agree, and I

don't necessarily agree, that the treatment notes show greater limitations than endorsed by the administrative law judge.

So in short, I find the physical components of the residual functional capacity finding to be supported by substantial evidence.

And turning to the mental aspects, it is true that consultative examiner, one-time consultative examiner Dr. Patricia Cameron, issued an opinion on January 14, 2020 that appears at 508 to 512 of the record. There are marked limitations noted in the medical source statement including in sustaining concentration and performing a task at a consistent pace, in sustaining an ordinary routine and regular attendance at work, and moderate limitation in regulating emotions, controlling behavior and maintaining well-being.

The opinion is discussed by the administrative law judge at two locations, 21 and 22, and again at 24 of the record. And again, while it doesn't necessarily state how much persuasion it is given, it is not necessarily rejected in toto. In fact much of the assessment is found to be more persuasive. The reasons for not adopting the marked limitations include, one, her mental status observations were anomalous in the record; two, the claimant's subjective reports of symptoms and restrictions remained inconsistent

with treatment modalities and all other mental status findings; and three, she was able to work during much of the alleged period at issue and repeatedly asserted she could work with good control of the symptoms when seeking medical clearances.

I would say that that gives me a, gives me a window into the ALJ's rationale, particularly when I read the decision as a whole and there is a substantial recounting of plaintiff's treatment. It was noted that on a couple occasions she was referred to specialized psychiatric treatment but did not follow up and she's never really had any specialized psychiatric treatment. The -- so -- and as I said, it's not, it's not right to say that the opinion was rejected in toto. Part of it was accepted and part rejected and as the case law clearly establishes, there's no obligation to either accept or reject an opinion, a medical opinion in whole. Again, plaintiff cites various treatment notes but simply asks the court to reweigh the evidence.

I notice that Dr. Ochoa and Dr. Ferrin, two state agency consultants, did not necessarily opine that plaintiff can frequently interact with others as was found in the ALJ's RFC. Dr. Cameron found only a moderate limitation in interacting with supervisors, coworkers, and the public at 511, Dr. Ochoa found moderate limitation in the worksheet with the general public but said that plaintiff is able to

interact with coworkers, supervisors, and the public in an appropriate manner at page 98. Dr. Ferrin opined the same, page 115. So in my view, the frequent interaction portion of the RFC is supported by substantial evidence. Again, there's no requirement that it necessarily parallel any one opinion. In the end, it is plaintiff's burden to show greater limitation.

The conclusion I reach is that substantial evidence supports the mental component of the RFC, including frequent interaction.

Plaintiff also challenges the evaluation of her reported symptomology, what we used to call credibility. Under the two-step review protocol applicable to assessing a claimant's subjective reports, an ALJ first determines whether the individual has a medically determinable impairment that could reasonably be expected to produce the alleged symptoms. And in this case the ALJ concluded that she did.

Secondly, the ALJ must then evaluate the intensity and persistence of those symptoms and determine the extent to which those symptoms limit the claimant's ability to perform work-related activities.

The administrative law judge began the analysis by recounting plaintiff's claims on the bottom of page 17 and the top of page 18, and then extensively discussed history of

her treatment including emergency room visits, noted that these were sporadic events, that Xanax and blockers were helping her conditions and that plaintiff on multiple occasions reported that her angioedema was under control. He did cite lack of treatment but it was not the primary basis for the determination. The primary basis is summarized at page 22 of the opinion and found that the medical evidence was not consistent with plaintiff's testimony. The reasoning is fivefold. One, her angioedema episodes were consistently minor and without complication despite incomplete adherence to specialist appointments and medications; two, she did not have specific asthmatic attacks or any documented respiratory clinical or laboratory diagnostic abnormalities; three, despite her obesity, her clinical findings were consistently within normal limits for strength, sensory, reflexes, gait, ranges of motion, gait, and movement even during her isolated angioedema episodes; four, no evidence to substantiate claims of specialized mental health care and panic attacks or poor control of symptoms; and five, her mental status clinical findings have been consistently within normal limits for behavior, manner of relating, mood, affect, speech, and cognition.

The credibility determination, and I'll use the word credibility, shorthand for evaluation of subjective complaints, the determination is normally entitled to

substantial deference, *Edward J. v. Kijakazi*, 2022 WL 4536257, September 28th, 2022. In this case I find it is supported by substantial evidence and I don't find any error in the credibility determination which is explained very well by the administrative law judge.

The last issue is the physical component of the RFC and where the light work finding came in. Dr. Azad at 513 to 515, January 13, 2020, opined that plaintiff has moderate limitations in lifting, carrying, et cetera. Dr. Gandhi at 86 to 100 on February 11, 2020, and later Dr. S. Putcha, 101 to 117 from June 23, 2020 opined that plaintiff is capable of performing medium work. The finding of light work is less than medium work. If it was error to ratchet down the physical component of the RFC, it was harmless. It is more favorable to the plaintiff and the failure to explain is harmless error. *Ryan W. v. Commissioner of Social Security*, 2022 WL 813934 from the Northern District of New York, March 17, 2022.

So I find that substantial evidence supports the RFC, both the physical and the mental health components, the determination regarding plaintiff's reported symptomology was proper and entitled to deference and I find no basis to disturb it. I find in total that substantial evidence supports the resulting determination and will grant judgment on the pleadings to the defendant and order dismissal of

plaintiff's complaint.

Thank you again to both of you and I hope you have a good afternoon.

MR. GOLDSTEIN: Thank you.

MR. KAISER: Thank you, your Honor.

(Proceedings Adjourned, 12:09 p.m.)

CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal Official Realtime Court Reporter, in and for the United States District Court for the Northern District of New York, DO HEREBY CERTIFY that pursuant to Section 753, Title 28, United States Code, that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 3rd day of August, 2023.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter